The Doctrine of Constitutional Dispensability: Governing the Constitutional Promise Before Exposure[1]

Anupam Saraph[2]

Abstract

If constitutional commitment is to govern before ordinary law may make impairment possible in principle, then the permissibility of rendering a constitutionally protected interest legally exposable must be settled at the point where lawful exposure is first created. Because that question concerns whether constitutional protection may be withdrawn, qualified, or denied at that point, it is constitutional in kind and cannot be left to delegated, administrative, empirical, or later litigated processes acting only within powers whose constitutional availability depends upon that very question. And because the same question would otherwise recur through successive ordinary acts that presuppose rather than determine permissibility, it must be settled once, in advance, and in universal form.

Where that prior determination is absent, the defect lies not in later injury, mitigation, or review, but in the initial opening of lawful exposure before constitutional permissibility has been established. What remains unsettled there is not answered later; it is displaced into successive ordinary acts that assume the permissibility they cannot themselves determine, producing constitutional drift and expanding efforts to govern consequences that arise only because the prior point of failure was left ungoverned.

It follows that no constitutionally protected interest may be rendered legally exposable unless its dispensability has first been determined as a prior, universal, and non-delegable constitutional question. The Doctrine of Constitutional Dispensability names that conclusion. A prior, universal, and non-delegable constitutional determination of dispensability is the necessary, unavoidable, and only practical implication of constitutional commitment if constitutional protection is to remain promise rather than aftermath.

Keywords

constitutional dispensability, lawful exposure, prior constitutional determination, non-delegability, constitutional law, environmental constitutionalism, public trust doctrine, intergenerational equity, proportionality, precautionary principle, constitutional protection, constitutional drift

---

[1] This paper is shared as an open working paper for scholarly discussion and citation.

[2] Independent scholar in the design and governance of complex systems. Email: anupam.saraph@systems-innovators.com.

Overview

I. Constitutional Commitment as Anterior Constraint 2
II. Legal Status and the Mechanics of Exposure 4
III. Foreseeability of the Causality Created by Status Alteration 6
IV. The Doctrine of Constitutional Dispensability 8
V. Dispensability is Not Decidable by Legislation, Administration, or Science 9
VI. The Universality of the Determination of Dispensability 11
VII. Why a Distinct Doctrine Is Required 13
VIII. Implications of the Doctrine 15

I. Constitutional Commitment as Anterior Constraint

What constitutional protection forbids cannot be made lawful by ordinary law.

Every constitution functions as a commitment that precedes ordinary governance. It promises that certain interests will not be placed at the mercy of routine political choice. Modern constitutional texts make this structure visible.

The Preamble to the United States Constitution declares the purpose of securing the "Blessings of Liberty," while the Fifth and Fourteenth Amendments prohibit deprivation of life or liberty without due process of law.[3] The Constitution of India resolves to secure justice, liberty, equality, and dignity[4], and guarantees protection of life and personal liberty under Article 21.[5] The Basic Law of the Federal Republic of Germany places human dignity at the center of

[3] U.S. CONST. pmbl.; U.S. CONST. amends. V, XIV.
[4] INDIA CONST. pmbl.
[5] INDIA CONST. art. 21.

constitutional order under Article 1.[6] The Constitution of South Africa affirms human dignity and guarantees the right to an environment not harmful to health or well-being.[7]

These commitments are not ornamental aspirations. They define interests that public authority may not impair except within constitutional limits. The constitution establishes or recognizes the legislature, executive, and judiciary, and defines the powers they may exercise. Through those powers, constitutional commitment is given effect. If constituted authority derives its existence and power from the constitution, it cannot stand prior to the constitution from which that power comes.[8] If it cannot stand prior to the constitution, it cannot possess the authority to override the commitment that gives it existence and limits. If constitutional commitment could be overridden by the ordinary exercise of constituted power, the source of authority would become subordinate to what it authorizes. That would invert the constitutional order. Constituted power can therefore act only within constitutional commitment, except where the constitution itself permits change and only through the processes by which it permits it.

If constitutional promise operated only after injury or after authorization, constituted power would decide first, and constitutional commitment would speak second. A commitment that speaks only after constituted power has already determined the legal conditions of impairment does not govern public power; it responds to it. A commitment that becomes operative only after the impairment it exists to prevent has already been authorized cannot function as a prior constitutional limit. Constitutional commitment is therefore anterior to ordinary governance. It is prior in the ordering of justification.

Because a commitment that operates only after authorization cannot function as a prior limit, systems of constitutional review invalidate acts that exceed constitutional limits not because harm has already occurred, but because authorization itself violates constitutional constraint. Constitutional commitment, therefore, binds the creation of legal conditions under which protected interests may be impaired. If public authority could create those conditions first and assess permissibility only afterward, constitutional protection would become contingent upon administrative sequencing.

In that arrangement, constitutional promise would not constrain public power. It would follow what public power had already authorized. The order of justification would be reversed. A constitutional commitment binds only if it limits what public power may authorize in the first place. The constitutional question is therefore anterior to the authorizing act. It is not a downstream consideration.

[6] GRUNDGESETZ [GG] [BASIC LAW], art. 1 (Ger.).
[7] S. AFR. CONST., 1996, § 24.
[8] Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421–24 (1960).

II. Legal Status and the Mechanics of Exposure

A protected interest is exposed not by injury, but by the legal act that makes injury permissible.

If constitutional commitment may be displaced until remedy after injury or authorization, the inversion has already occurred before the remedy begins. Remedy, therefore, cannot be sufficient. It answers only after the constitutional order has already been reversed, and it leaves unaddressed the defect in the exercise of power by which constitutional commitment was displaced, as well as the prior legal alteration that made that displacement possible. That prior legal alteration is legal drift: a change in legal position through which a protected interest ceases to be governed by constitutional commitment at the point of authorization.

The defect must therefore lie in the exercise of the power that made that displacement possible. Because public power acts only through the powers the constitution grants or recognizes, the inversion can arise only within their legal operation. And because those powers act upon interests only through the legal positions they assign, the drift that makes inversion possible can lie only there.

Public power acts upon interests through the legal positions it assigns to them. Those positions may be conferred, altered, qualified, or withdrawn through many legal acts, including definitions, classifications, notifications, delegated rules, adjudicative decisions, and direct directives. Where such acts determine whether alteration of a constitutionally protected interest is prohibited, conditioned, or permitted, they determine whether constitutional insulation is maintained, qualified, or withdrawn.

Definitions provide a clear illustration of how such legal drift can occur. Courts have long recognized that statutory definitions are not merely descriptive; they determine jurisdiction, trigger regulatory consequences, and structure permissible downstream action.[9] A definitional or classificatory act therefore determines whether protection attaches and, with it, whether insulation is maintained or exposure is created.

The mechanics are straightforward. A legal act assigns or alters the position through which an interest is treated in law. That position carries legal consequences. Those consequences determine whether alteration is prohibited, conditioned, or permitted. When protection attaches, insulation follows. When protection is qualified, insulation becomes conditional. When protection is withdrawn, exposure is created. Exposure, then, is the authorization of structural conditions under which impairment becomes legally possible.

[9] See, e.g., *Rapanos v. United States*, 547 U.S. 715, 722–23 (2006) (plurality opinion) (recognizing that the scope of "waters of the United States" determines the reach of federal regulatory authority under the Clean Water Act).

This does not introduce an unfamiliar legal logic. Public law already proceeds on the understanding that jurisdiction, status, classification, and authorization determine what government and private actors may lawfully do. A change in legal position can alter whether a permit is required, whether a restraint applies, whether a duty exists, whether jurisdiction is triggered, or whether a condition of legality is met. Where such a change affects the legal position that insulates a constitutionally protected interest against impairment, the constitutional issue arises not only because later acts may occur under the altered legal conditions, but also because lawful exposure has already been created at the level of authorization itself.

The structure is visible in ordinary environmental regulation. Under the Clean Water Act, discharge of dredged or fill material into "navigable waters" requires prior authorization.[10] The Act defines "navigable waters" as "the waters of the United States,"[11] and implementing regulations define "wetlands" as:

those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.[12]

If land satisfies that definition, a federal permit is required before alteration may proceed.[13] If it does not, that federal barrier does not attach. The terrain does not physically change at the moment of classification. Its legal condition does. With that change, the pathway to alteration shifts from presumptive prohibition absent authorization to presumptive permissibility subject only to other law.

The same structural mechanics appear in forest regulation. The Forest (Conservation) Act, 1980 prohibits the use of "forest land" for non-forest purposes without prior approval of the Central Government.[14] The statute does not exhaustively define "forest." In T.N. Godavarman Thirumulpad v. Union of India, the Supreme Court of India held that the term must be understood according to its dictionary meaning and is not confined to forests formally notified under statutory regimes.[15] Land that satisfies that meaning attracts the statutory restriction. Where land is treated as falling outside that category, the approval requirement does not apply. The trees do not instantly disappear upon reclassification. The hydrology does not instantly alter. What changes is the legal condition. With that change, exposure follows.

Exposure, in this sense, is a distinct legal condition. It does not presuppose realized injury. It denotes the point at which alteration becomes permissible in principle, and downstream causal pathways are foreseeably unlocked. Once protection is withdrawn, impairment need not be

[10] 33 U.S.C. § 1344(a) (2018).
[11] Id. § 1362(7).
[12] 33 C.F.R. § 328.3(c)(16) (2023).
[13] 33 U.S.C. §§ 1311(a), 1344(a) (2018).
[14] Forest (Conservation) Act, 1980, § 2, No. 69, Acts of Parliament, 1980 (India).
[15] *T.N. Godavarman Thirumulpad v. Union of India*, (1997) 2 S.C.C. 267, 274–75 (India).

directly ordered by the State. It may occur through ordinary instruments of governance, permitting regimes, zoning approvals, licensing decisions, infrastructure authorizations, or through private action operating within the newly permissive field. The constitutional significance lies not in the certainty of harm, but in the authorization of conditions under which harm becomes legally possible. [16]

The pattern is not confined to environmental law. It applies wherever constitutional or statutory protection depends upon legal position. Whenever legal action determines whether an interest remains insulated, becomes conditional, or is rendered exposed, that action becomes legally decisive. The State does more than describe. It alters the legal position through which protection holds or falls away. At that moment, the State authorizes the conditions under which downstream harm through ordinary governance and private conduct becomes legally available. Injury may materialize later, or not at all. But exposure is created at the point at which legal protection is withdrawn, qualified, or denied.

When public power alters the legal position of a constitutionally protected interest so that constitutional commitment no longer governs at the point of authorization, legal drift has already entered the exercise of power itself. The defect lies not only in later injury, but in the prior legal alteration that made inversion possible. The juridical hinge is therefore not the later manifestation of harm, but the upstream legal act by which insulation is maintained, conditioned, or withdrawn.

III. Foreseeability of the Causality Created by Status Alteration

What law makes exposable, it makes foreseeably impairable

When public power alters the legal position of a protected interest, it alters more than the formal treatment of that interest in law. Because legal position governs what may or may not lawfully be done to the interest, a change in legal position alters the structure of authorization through which later action may occur. Once alteration becomes legally permitted or conditionally permitted, the causal pathways through which impairment may arise are no longer external to the legal order. They arise within it. The question that follows is therefore not whether injury has already occurred, but whether the legal alteration has already made impairment foreseeable.

Foreseeability in this context does not depend on empirical prediction or normative judgment, because it follows from the legal alteration itself. Whenever law assigns a legal position, it necessarily partitions the legal order by determining which rules attach to which interests. A change in legal position, therefore, changes the partition through which an interest is governed.

[16] *Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007).

Because rules apply according to that partition, a change in legal position necessarily changes whether alteration of an interest is barred, conditioned, or permitted. If a protected interest is moved from a position in which alteration is barred to one in which alteration is permitted or conditionally permitted, the lawful possibility of impairment follows from that change alone. It follows from the altered structure of authorization itself.

That change also has an informationally necessary consequence, because once legal position changes, the governing order recognizes the interest differently and therefore makes a different set of public and private responses legally available to it. Some of those responses may impair the protected interest. The point is not that such responses will certainly occur, but that the legal change has made them available, and with them the pathways through which impairment may arise. Under a different legal position, those pathways might not exist. Because delay concerns manifestation, not structural possibility, foreseeability attaches not to the later appearance of injury, but to the legal restructuring that makes different forms of treatment and impairment lawfully possible.

A permit regime provides a clear illustration. Where a protected interest is subject to a legal restraint that bars alteration without prior constitutional or legal clearance, that restraint governs at the point of authorization. If a later order, exemption, approval, or directive removes that restraint and permits the alteration, the protected interest need not yet have been touched, and no immediate injury need yet be visible. It is enough that the altered legal position has made the act lawfully available. At that moment, the protection that previously governed the interest at the point of authorization has fallen away, and the pathways through which impairment may arise have already entered the legal order.

Once legal position is altered so that impairment is no longer structurally barred, it follows that the structure within which impairment may occur has already been changed. Because constitutional limits constrain authorization and not merely the later realization of harm, scrutiny cannot be deferred until injury manifests without reducing constitutional guarantees to a remedial rather than preventive function. The relevant constitutional inquiry, therefore, attaches at the moment exposure is created, because that is when the structure of lawful possibility is altered.

The constitutional significance, therefore, lies in the fact that once legal alteration changes whether impairment of a protected interest is barred, conditioned, or permitted, the lawful possibility of impairment becomes inevitably foreseeable at the point of authorization itself.

IV. The Doctrine of Constitutional Dispensability

What the Constitution protects cannot be made legally exposable before its dispensability is constitutionally determined.

If Sections I through III are correct, then three things already follow. Constitutional commitment is anterior to ordinary governance. Legal alteration can change the position through which a protected interest is governed. And once that position is altered so that impairment becomes barred, conditioned, or permitted in a different way, the lawful possibility of impairment becomes foreseeable at the point of authorization itself. If those propositions hold, the constitutional issue cannot first arise after injury. It follows that the issue is whether a constitutionally protected interest may be rendered legally exposed at all, and, if so, under what constitutional conditions.

Given that the constitutional issue must arise before any injury is suffered, the event that triggers that question cannot be the injury itself. Since the only candidate for such an upstream event is the legal act that first makes the injury possible, because no other event alters the legal position through which protection governs, it creates the legal conditions under which impairment may occur, and is, in that sense, foreseeable exposure. Once those conditions have been created, any subsequent legal intervention, whether legislation, rule-making, the establishment of commissions or committees, the conferral of delegated authority, or the familiar processes of permitting, licensing, impact assessment, mitigation, or administrative review, operates on the assumption that exposure is already permissible.

Because legislation itself exercises authority derived from the Constitution, it cannot supply permission that the Constitution withholds, and it cannot determine the limits of the constitutional protection from which its own authority derives. It follows that no downstream legal act can resolve whether the creation of exposability is compatible with the constitutional commitment that protects the interest. That question concerns the scope of constitutional protection and must therefore be addressed at the constitutional level rather than through empirical, regulatory, or administrative processes[17].

[17] Aharon Barak, Proportional Effect: The Israeli Experience, 57 U. Toronto L.J. 369, 370 (2007).

From that structure, the doctrine follows. If a constitutionally protected interest cannot be rendered legally exposed by ordinary power unless constitutional commitment already permits that result, then exposure must be preceded by a constitutional determination of whether such exposure is compatible with the commitment that protects the interest.

Doctrine of Constitutional Dispensability

No constitutionally protected interest may be rendered legally exposed unless its constitutional dispensability has first been determined by the constitutional authority entrusted with defining the scope of constitutional protection.

That determination must be prior, non-delegable, and universal. It must decide, for the protected class and the legal position through which constitutional protection governs it, whether alteration of that position, including withdrawal, qualification, or denial of constitutional insulation, is constitutionally permissible at all.

This doctrine arises only where an ordinary legal act alters the position through which constitutional protection governs a protected class in a way not already authorized by prior constitutional determination.

V. Dispensability is Not Decidable by Legislation, Administration, or Science

No authority may decide dispensability through powers that presuppose it.

Since dispensability must be determined through a prior non-delegable constitutional judgment, the remaining question is which institution may decide it. If ordinary institutions derive authority only to carry constitutional commitment into effect, then what is delegated to them is implementation, not revision of the constitutional promise. And since dispensability concerns whether and how constitutional protection may be withdrawn or qualified at all, while ordinary legal action operates only through the legal position by which that protection governs, that question cannot be left to delegated institutions. It concerns the scope of constitutional protection itself.

If legislation derives its authority from the Constitution, it cannot determine the limits of the constitutional protection from which that authority itself derives. Legislation may regulate, organize, and implement within constitutional commitment. But if it alters the legal position through which constitutional protection governs a protected interest, it cannot conclusively determine the permissibility of that alteration. To do so would be to allow ordinary law to determine the scope of the constitutional promise that authorizes it. That would reverse the constitutional order already established in Sections I through IV.

Administrative authority manages, regulates, and enforces conduct only within permissions already established. Because it acts only within such permissions, it cannot determine whether constitutional protection may be withdrawn or whether a protected interest may be rendered legally exposable.

If scientific inquiry proceeds by observation, method, and validation, it may reveal functions and interdependencies, illuminate what exposure entails in fact, and clarify how impairment may manifest. But if the question is whether constitutional commitment may be narrowed or whether legal exposure is permissible in principle, empirical inquiry cannot settle it, because it addresses manifestation and evidence, not the scope of constitutional protection. It follows that scientific inquiry may inform constitutional judgment, but it cannot replace it.

If legislation cannot determine the constitutional limits of the promise from which its authority derives, if administration regulates only within assumed permissibility, and if scientific inquiry can illuminate consequences without deciding compatibility, then none of these institutions can conclusively determine dispensability. It follows that the question of whether exposure is compatible with constitutional commitment is neither administrative, legislative, nor empirical in character. It is constitutional.

If a constitution protects an interest, and a state act renders that interest legally exposable by altering the point at which constitutional commitment governs, that act authorizes the possibility of impairment and therefore affects the scope of constitutional protection itself rather than merely its implementation or empirical assessment. It follows that only the constitutional authority entrusted with defining the scope of constitutional protection may determine whether that interest may be rendered legally exposable, whether absolutely or under specified constitutional conditions.

Because dispensability concerns whether constitutional protection may be withdrawn, qualified, or denied in principle, the doctrine does not arise whenever ordinary law merely regulates conduct within a constitutional framework already settled. It arises only where an ordinary legal act alters the position through which constitutional protection governs a protected class in a way not already authorized by prior constitutional determination. Only then does the question cease to be one of implementation and become one of whether protection may continue to govern in the same way at all.

If any contrary approach were accepted, subordinate institutions would be permitted, through implementation, regulation, validation, or ordinary lawmaking, to revise the very promise they were empowered only to carry out. It therefore follows that dispensability is not decidable by legislation, administration, or science. It is decidable only by the constitutional authority competent to determine the scope of constitutional protection.

VI. The Universality of the Determination of Dispensability

What is constitutional in kind must be settled in principle, not remade piecemeal.

If dispensability concerns whether constitutional protection may be withdrawn, qualified, or denied in principle, then the determination cannot be confined to the facts of a single case. A case-specific inquiry asks whether one permit, one order, one project, or one legal act may proceed. Dispensability asks an earlier question: whether a protected class of object, relation, condition, or legal position, together with the constitutionally protected interests attaching to it, may ever be rendered legally exposable at all, and, if so, by what constitutional principles and within what limits. If that is the question, the determination belongs to the level of constitutional principle at which that protected class is governed, not to each later instance in which it may arise.

If the determination is not made at that level, the same constitutional question reappears whenever an ordinary legal act alters the position through which protection governs. In that event, dispensability is not decided once in principle. It is remade in fragments through successive ordinary acts. If that happens, either ordinary institutions answer for themselves what only constitutional authority may decide, or the constitutional order is forced to repeatedly reconsider the same issue each time a new instance arises. In the first case, constitutional commitment is displaced through piecemeal ordinary action. In the second, legislation, administration, and regulation proceed without a stable constitutional frame. What appears to be practical particularization is therefore practical incoherence: the same constitutional question is left unsettled where ordinary action requires it to be settled.

If the same question is left to recur in that way, constitutional drift follows. Drift does not arise because one isolated act is wrongly issued. It arises because the legal position through which protection governs is altered again and again before the Constitution has determined whether such alteration is permissible in general for the protected class under consideration. If drift arises at that level, it can be prevented only at that level. Anything less leaves the same constitutional question to be remade through successive ordinary acts and therefore leaves drift structurally intact.

It follows that universality is not an added refinement to the doctrine but the only form in which the doctrine can practically hold. If dispensability is determined once and in advance for the protected class and the form of legal exposure under consideration, later legal instruments that operate within that determination do not decide dispensability again; they apply a determination already made. But if no such determination exists, and an ordinary legal act alters the position through which protection governs in a way not already constitutionally settled, then the question of dispensability arises at that point, because the Constitution has not yet determined whether that protected class may be rendered legally exposable at all, or on what terms.

If dispensability must therefore be determined universally, the content of that determination also follows. Constitutional authority must first identify the protected class under consideration and the constitutionally protected interests attaching to it, because without that identification, there is nothing against which compatibility with constitutional commitment can be judged. Once that is identified, constitutional authority must determine by what constitutional principles, if any, that protected class may be rendered legally exposable, and in what manner. If no constitutional principle permits exposure, dispensability fails. If a constitutional principle does permit exposure, constitutional authority must also determine the limits and safeguards that govern subsequent legal acts affecting that protected class. Without such prior limits and safeguards, the same constitutional question would again be decided piecemeal whenever later acts alter the legal position through which protection governs.

The determination of dispensability, therefore, contains three constitutional inquiries. First, what protected class is under consideration and what constitutionally protected interests attach to it. Second, by what constitutional principles, if any, that protected class may be rendered legally exposable, and in what manner. Third, what limits and safeguards must govern later legal acts so that constitutional drift does not recur when the legal position through which protection governs is altered within those limits.

If ordinary institutions cannot decide dispensability for themselves, then the only question left to them is whether the proposed act remains within ordinary implementation or instead reopens the prior constitutional question. That distinction depends on whether the act alters the position through which the protected interests are governed. If no such alteration occurs, the act remains within ordinary implementation. If such an alteration does occur, the issue is no longer merely how protection is to be administered, but whether protection may continue to govern in the same way at all. Since ordinary institutions cannot decide that question, it can only be raised for determination by the constitutional authority competent to decide dispensability.

A question about whether constitutional protection may be withdrawn in principle cannot recur in each later instance and still count as having been determined in principle. If it recurs in that way, it is no longer settled constitutionally once and for all but remade through ordinary law. The determination of dispensability is therefore universal, because anything less leaves the same constitutional question to be decided again and again, which is exactly how drift occurs.

VII. Why a Distinct Doctrine Is Required

Existing doctrines govern exposure once assumed; this doctrine governs whether exposure may be assumed at all.

If constitutional commitment is to hold before ordinary law makes impairment possible in principle, then the prior legal creation of exposure cannot remain ungoverned. Whether a distinct doctrine is required, therefore, turns on a narrower question: do the field's established doctrines already supply, in their own terms, the constitutional rule that determines whether ordinary law may first render a protected interest legally exposable at all? That question cannot be answered by asking whether those doctrines matter or whether they protect important interests. It can be answered only by asking whether the forms of reasoning through which they operate govern that prior point.

Since proportionality begins with the justification of limitation, it cannot by that form alone determine whether the legal condition in which limitation becomes available may first be created.[18] Since public trust reaches the prior stage only where the interest stands in a relation of obligation inconsistent with surrender, it cannot, by that form alone, determine the constitutional permissibility of every prior alteration of the legal position through which protection operates.[19] Since intergenerational equity constrains present action by reference to obligations across time, it cannot by that form alone determine whether the field in which those obligations will later be violated may first be opened.[20] And since structural reasoning identifies displacement at the level of constitutional order, it cannot, by that form alone, supply the more exact constitutional rule governing the recurring legal act through which that displacement is effected.[21]

If each doctrine reasons from a different constitutional problem, and if each depends on a form of reasoning that presupposes a field of exposure already open, already assumed, or already operative, then none supplies in its own terms the constitutional rule governing the prior question whether ordinary law may first render a protected interest legally exposable at all. The prior point at which exposure is first created, therefore, remains ungoverned by the field's established doctrines in their own terms. A distinct doctrine directed to that point follows on that ground alone.

But that ground is not the only one. So long as the prior question remains ungoverned, the neighboring doctrines cannot be taken up in the form their own protective logic requires. A

[18] Aharon Barak, Proportional Effect: The Israeli Experience, 57 U. Toronto L.J. 369, 370 (2007); see also Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3098–3101 (2015).
[19] Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452–53, 455–56 (1892).
[20] Edith Brown Weiss, The Planetary Trust: Conservation and Intergenerational Equity, 11 Ecology L.Q. 495, 495–96 (1984).
[21] Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421–24 (1960).

constitutional determination cannot be made through delegated, administrative, empirical, litigated, or case-specific processes whose authority presupposes the very permissibility at issue. If dispensability is recognized as the prior constitutional question instead, the questions those doctrines articulate can no longer arise merely as later questions about the justification, regulation, or consequences of a particular act. They must arise at the prior point, in constitutional form, and in universal terms, because the issue is no longer whether this case may proceed within a field already available to law, but whether this protected interest or class of interests may be rendered legally exposable at all, and if so, under what constitutional conditions.

Because the permissibility of exposure depends on the constitutional questions these doctrines articulate, they supply questions by which dispensability must be reasoned, but not the constitutional rule that determines it. Proportionality then asks whether this form of exposure to this protected interest or class of interests is ever constitutionally justifiable. [22] Public trust asks whether the interest stands in a relation to public obligation constitutionally inconsistent with exposure altogether.[23] Intergenerational equity asks whether present institutions may constitutionally treat the interest or class of interests as available consistent with obligations across time.[24] Structural constitutional reasoning asks whether authorizing this form of exposure preserves constitutional language while, in practice, relocating constitutional control.[25] And because that determination is constitutional in kind, it must be made through constitutional rather than delegated, administrative, empirical, or case-specific forms of decision. Those same authorities support this elevation from ordinary downstream use to prior constitutional reasoning addressing the protected interest or class of interests in universal form.

Since the prior point would otherwise remain ungoverned, since the same question would otherwise recur case by case rather than be settled in universal form, and since a determination constitutional in kind cannot be left to delegated forms of decision, a distinct doctrine directed to that point follows. Only such a doctrine can govern the prior point at which constitutional commitment must first hold. Only such a doctrine can elevate the field's existing protective reasoning into prior constitutional reasoning capable of determining whether a protected interest or class of interests may be rendered legally exposable at all, and if so under what constitutional conditions.

[22] Aharon Barak, Proportional Effect: The Israeli Experience, 57 U. Toronto L.J. 369, 370 (2007); see also Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3098–3101 (2015).
[23] Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 452–53, 455–56 (1892).
[24] Edith Brown Weiss, The Planetary Trust: Conservation and Intergenerational Equity, 11 Ecology L.Q. 495, 495–96 (1984).
[25] Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421–24 (1960).

VIII. Implications of the Doctrine

The Doctrine of Constitutional Dispensability requires constitutional governance before exposure

If constitutional commitment is to govern before ordinary law makes impairment possible in principle, then the permissibility of rendering a protected interest legally exposable must be determined as a prior and non-delegable constitutional question. Since that determination is constitutional in kind, it cannot be conclusively settled by the legislature, administration, delegated decision, empirical inquiry, or later litigation acting only within powers whose constitutional availability depends upon that very question. If it is not settled once, in advance, and in universal form before exposure is first lawfully created, ordinary institutions must nevertheless act. They can do so only by presupposing the permissibility of exposure they cannot themselves conclusively determine. The constitutional question is thus not answered at the point and in the manner it must be settled, but displaced into downstream processes, so that what appears as a later application proceeds on an assumed constitutional permissibility that has never been determined.

If that occurs, the constitutional question does not disappear. It is remade in fragments through successive ordinary acts that presuppose rather than determine the permissibility of exposure. Either ordinary institutions answer for themselves what only constitutional authority may decide, or the same constitutional issue is repeatedly reopened through permits, classifications, exceptions, assessments, administrative findings, and posterior claims. In the first case, constitutional commitment is displaced through piecemeal ordinary action and continued delegation. In the second, the legal order is burdened with the repeated reconstruction of a question that should have been settled before exposure was lawfully created. In both cases, the consequence is the same: drift increases, injury expands, and the effort to govern what follows multiplies through mitigation, remediation, compensation, and litigation that still do not answer the original constitutional question at all.

Because the determination of dispensability is constitutional in kind and therefore non-delegable, and because ordinary institutions must nevertheless act whenever exposure is lawfully created, they can only proceed by presupposing the permissibility of exposure unless that determination has already been made. That structural fact is what makes recurrence, drift, delegation, expanding injury, and proliferating litigation inevitable in the absence of a prior determination, and what makes their removal equally inevitable once the determination is made. The implications of the doctrine, therefore, follow as constitutional necessities: only a prior and universal determination prevents displacement, stabilizes the field in which ordinary institutions act, and keeps constitutional protection operative at the point where exposure is first created.

If dispensability is instead determined where constitutional commitment requires it, exposure is not lawfully created before its permissibility has been constitutionally settled. Ordinary institutions no longer answer for themselves what only constitutional authority may decide, but act within a field whose availability has already been defined. Injury does not expand through assumptions never authorized. Mitigation, remediation, compensation, and litigation do not multiply in an effort to reconstruct a question that should never have been left open. What would otherwise recur through fragmented downstream acts need not be remade after exposure has already been lawfully set in motion.

If dispensability is recognized as the prior constitutional question, its determination must proceed by asking the constitutional questions on which the permissibility of exposure depends. Because the permissibility of exposure depends on the constitutional reasons, obligations, temporal constraints, and structural limits that these doctrines articulate, they supply the constitutional questions by which dispensability can be determined. Because those questions concern the prior constitutional permissibility of rendering a protected interest or class of interests legally exposable at all, they cannot be answered in the delegated, administrative, empirical, or later-litigation forms in which these doctrines are ordinarily applied after exposure has already been created. The reasoning those doctrines articulate must therefore be taken up in prior constitutional form, at the point where the permissibility of exposure is itself to be settled.

Once the prior determination is understood to be constitutional in kind and non-delegable, these doctrines are elevated into constitutional reasoning: they supply the universal questions by which constitutional law determines whether a protected interest or class of interests may be rendered legally exposable at all, and if so, under what constitutional conditions. Proportionality then asks whether exposure, if permissible at all, is justified by sufficient constitutional reasons and proper means. Public trust asks whether the interest stands in a relation to public obligation constitutionally inconsistent with surrender or exposure altogether. Intergenerational equity asks whether present institutions may treat the interest as available consistent with obligations owed across time. Structural constitutional reasoning asks whether the proposed form of exposure preserves constitutional promise or, in practice, relocates constitutional control.

A prior, universal, and non-delegable constitutional determination of dispensability therefore follows as the necessary, unavoidable, and only practical implication of constitutional commitment as a prior limit on what public power may authorize. Without it, constitutional protection is displaced into the aftermath, assumed rather than determined, and burdened with ever-expanding efforts to govern consequences that arise only because the point of failure was left ungoverned at the start. With it, constitutional protection governs where it must govern, and in the only form in which it can govern: through a constitutional determination made by the constitutional authority, in the constitutionally established manner, once, in advance, and in universal form, before a constitutionally protected interest is first rendered legally exposable.

[**First Version**: February 20, 2026 **Revised**: March 30, 2026 Version 1.4]